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No. 09-429

# In The
# Supreme Court of the United States

SARAH ELLENBERG,

*Petitioner*,

v.

NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,

*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## PETITIONER'S REPLY BRIEF

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## ARGUMENT

I. Protection from disability discrimination for students who are "labeled" through the special education process is an important legal question for millions of children.

To date, the New Mexico Military Institute (NMMI) flies under the radar – evading federal laws which exist to protect the rights of public school students who are disabled. The New Mexico public high school's decades of obstinance might be an anomaly, unique to the isolated rural southwestern United States and of no importance for this Court's review, were it not for the consequences of the Tenth Circuit's decision. First, in New Mexico, students with disabilities are effectively cut off from one public education option available to qualified nondisabled New Mexico high school students – military style college-preparatory high school education. Second, after this decision, across the country, school-aged children, *affixed with a disability label by public schools* through IDEA's detailed statutory process for identification, are not automatically protected under the umbrella of federal laws proscribing discrimination on the basis of disability.

The Tenth Circuit's decision creates a rule of law, completely at odds with the overall framework of federal legislation and national policy applicable to disabled school children, that a student identified as a "child with a disability," under the IDEA must prove "more" in order to receive public education free from

discrimination.[1] If children who have qualified for special education are not *necessarily* entitled to protection from discrimination, a dangerous loophole sanctioning discriminatory conduct threatens to reverse decades of progress allowing access to public education for children with disabilities.

NMMI urges the Court to decline review of this case reserving Rehabilitation Act and ADA protection for "real victims of discrimination." NMMI Brief in Opposition at 15. Over six million school-aged children receive special education pursuant to the IDEA.[2] Application of the Tenth Circuit's decision by school authorities across the country potentially leaves all of these children vulnerable to discrimination on the basis of disability.

While lower courts often minimize attention paid to cases which only apply to children, this Court has not avoided enforcement of laws on behalf of children with disabilities. Review of this case follows logically this

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[1] "Child with a disability" is a term of art under the IDEA. 20 U.S.C. §1401(3)(A)(1997). The term encompasses both identification of a particular disabling condition (20 U.S.C. §1401(3)(A)(i)) and determination that provision of "special education" is needed for the child's participation in public education (20 U.S.C.§1401(3)(A)(ii)).

[2] According to the United States Department of Education, more than six million children received special education under the IDEA during the 2006-2007 school year. *See* IES National Center for Education Statistics, Digest of Education Statistics, "Table 52" at http://nces.ed.gov/programs/digest/d08/tables/dt08_052.asp, last visited 11/24/2009.

Court's repeated willingness to explain the IDEA.[3] Thousands of school districts and thousands and thousands of parents look to this Court's IDEA cases for day to day questions about implementation of special education. Without the Court weighing in now on the necessary intersection between IDEA and federal law prohibiting discrimination on the basis of disability, the goal of federal legislation is endangered.

Special education – as described in the IDEA – is not an end in itself. Its purpose was to reverse states' denial of access to public education for students with disabilities. "[T]he intent of the Act was more to open the door of public education to the handicapped...." *Bd. of Educ. of Hendrick Hudson v. Rowley,* 458 U.S. 176, 192 (1982).[4] Nonstop reliance on the courts to explain the intricacies of special education law will just barely

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[3] From 1982 to the present, the United States Supreme Court has issued eleven decisions which explain the IDEA. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176 (1982); *Irving Ind. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984); *Smith v. Robinson,* 468 U.S. 992 (1984); *Sch. Comm. of Town of Burlington v. Dept. of Educ. of Massachusetts,* 471 U.S. 359 (1985); *Honig v. Doe,* 484 U.S. 305 (1988); *Florence Co. Sch. Dist. Four v. Carter,* 510 U.S. 7 (1993); *Cedar Rapids Comm. Sch. Dist. v. Garret F.,* 526 U.S. 66 (1999); *Schaffer v. Weast,* 546 U.S. 49 (2005); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291 (2006); *Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516 (2007); *Forest Grove Sch. Dist. v. T.A.,* ___ U.S. ___, 129 S.Ct. 2484 (2009). Two additional decisions interpret the IDEA indirectly. *See Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687 (1994).

[4] At the time of this Court's decision in *Rowley,* New Mexico was the only state which continued to decline participation in the IDEA. *See Rowley,* 458 U.S. at 184.

keep the school house door ajar if federal laws prohibiting discrimination against disabled students are evaded. IDEA's process for identifying students with disability must be understood to be synonymous with establishment of protection under the Rehabilitation Act and Title II of the ADA or students identified for special education by public schools are simply identified as targets for discrimination, without protection.

New Mexico Military Institute's Brief in Opposition is intended to create confusion sufficient to divert analysis away from the important federal question presented by Ms. Ellenberg's Petition. While the shrillness can hardly be missed, three claims by NMMI require direct response to eliminate confusion about the history and posture of this case. First, Ms. Ellenberg was not "qualified for special education services on the basis that she was diagnosed with Oppositional Defiance Disorder." Brief in Opposition at page 1. Second, no court has ever found that NMMI "complied with the IDEA." Brief in Opposition at page 2. Third, the record below contains evidence that Ms. Ellenberg was "otherwise qualified," and met the nondiscriminatory standards for admission to NMMI when she applied in the spring of 2003.

II. NMMI doth protest too much.

A. Reliance is not placed on diagnosis to establish disability.

NMMI, which has never complied with the IDEA or provided any kind of special education, misunderstands the process for determination of disability sufficient for eligibility under the IDEA. The

IEP team, which consists of specific people identified by the statute including "qualified professionals", determines eligibility for special education based on the steps required by the statute, not in reliance on a diagnosis given by a provider outside of the public school system. *See* 20 U.S.C. §1414(a), (b), (c) (1997).

Petitioner Ellenberg does not argue that a "diagnosis" is sufficient to establish handicap or disability under the Rehabilitation Act or Title II of the ADA in a public school setting. Rather, her argument is that the *process* for determination of disability sufficient for IDEA eligibility in public schools, based on required steps which include finding that the disability impacts the student's ability access education, is synonymous with proof of disability required for protection under the Rehabilitation Act and Title II of the ADA for public school students.

B. NMMI has never complied with the Individuals with Disabilities Education Act.

It is inaccurate for New Mexico Military Institute to state that the United States District Court found "NMMI had satisfied its IDEA obligations," and that "NMMI complied with the IDEA." Brief in Opposition at page 2. The District Court's first decision in 2005 suggests that NMMI is beyond the reach of federal law. That Court first issued decision for NMMI, not based on any finding of compliance with the IDEA, but on 1) the Court's deference to state law in conflict with the IDEA; 2) misunderstanding about the interrelationship between the IDEA and nondiscrimination laws; and 3) the Court's unwillingness to recognize the fact questions created

by the school's failure to implement IDEA and use of facially discriminatory admissions standards.

The District Court never found that NMMI complied with the IDEA. "The [IDEA due process hearing officer] found that NMMI does not provide special education programs, at least in accordance with the IDEA, and this finding is supported by the record." *Ellenberg v. New Mexico Military Institute,* No. 04CV0347, 2005 WL 5467718 *8 (D.N.M. Feb. 7, 2005). The Tenth Circuit Court of Appeals, in review of the 2005 United States District Court decision, affirmed dismissal of the IDEA claim based on a failure to exhaust IDEA administrative remedy by the Ellenbergs who, according to the appellate court, should have filed for IDEA due process against the student's Local Educational Agency, rather than against NMMI. *Ellenberg v. New Mexico Military Institute,* 478 F.3d 1262, 1275-1279 (10th Cir. 2007).

C. NMMI admissions standards are facially discriminatory.

Unashamedly, NMMI argues that its facially discriminatory admissions standards are "the core of the NMMI program." Brief in Opposition at 13. NMMI is oblivious to the discriminatory character of its admissions policies which include among the "behavioral standards [which are] considered *disqualifying for admission*" to its public high school: "regularly scheduled psychological counseling."

Ms. Ellenberg consistently argued and presented evidence that she met all nondiscriminatory genuine

admissions standards[5] without any need for reasonable accommodation. NMMI's stated requirement that any potential for "regularly scheduled psychological counseling" be sacrificed, as a precondition to high school admission, is at the center of Ms. Ellenberg's disability discrimination claim which was blocked from decision on the merits by the Tenth Circuit's decision upholding summary judgment for NMMI on the basis that Ms. Ellenberg did not establish "disability" sufficient to be protected from discrimination.

## III. Conclusion

Petitioner asks this Court to grant her petition for certiorari.

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[5] Issues of fact exist as to whether some of NMMI's proffered admissions standards, such as "past drug use," were actually used by NMMI to exclude nondisabled applicants from admission to the high school.

Respectfully submitted,

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